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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

Petitioner Northwest Airlines, Inc., submits this reply brief in support of its petition for a writ of certiorari.

INTRODUCTION

In its effort to discourage this Court from granting certiorari, ALPA suggests that the record is cloudy, that the Equal Pay Act issue involves no conflict, and that the Title VII issues are premature. These efforts to shield the unions from a share of the liability that they helped to create should not succeed.

First, although the case arises on pretrial motions, Northwest's statement of its factual context fairly portrays what has occurred. The statement rests upon the allegations of the complaint, which must be assumed as true for purposes of the unions' motion to dismiss. *Transamerica Mortgage Advisers, Inc. v. Lewis*, No. 77-1645 (U.S. November 13, 1979) (48 U.S.L.W. 4001); *Beal v. Missouri Pacific Railroad Corp.*, 312 U.S. 45 (1941). In addition, the statement draws upon the extensive findings of fact in the *Laffey* litigation, out of which this case grows and in which ALPA itself was a party. *See Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973). In assessing the appropriateness of reviewing the legal issues framed by the petition, the Court should be aware that the factual basis of Northwest's claim for contribution is neither weak nor speculative.

Second, ALPA is flatly wrong in insisting that the cases are in accord in immunizing unions from Equal Pay Act liability. There is confusion among the circuits about the existence of this predicate for an employer's claim for contribution. ALPA makes little effort to contest the importance of the issue.

Third, ALPA tries to sidestep the Title VII issues with a cry of prematurity. The cry has a hollow ring

in light of the unions' own successful effort to obtain an interlocutory appeal on the issue under 28 U.S.C. §1292(b). That appeal rested on the trial judge's certification of a controlling legal issue the immediate resolution of which would materially advance the ultimate termination of the litigation. (Br. in Opp. App. 1b). It is also hard to credit a claim of "prematurity" in a case that has been pending for five years.

ALPA implies in its Brief in Opposition (at 5) that Northwest harbored some untoward litigation strategy when it did not claim contribution of the outset of the *Laffey* litigation. To the contrary, however, Northwest merely relied on the factors described at pp. 24-25 of the petition in concluding that it was both unnecessary and undesirable to complicate the *Laffey* case by asserting contingent cross- or third-party claims for contribution prior to trial.

Contrary to ALPA's further implication, the ruling by the court of appeals in *Laffey* that the possible "hardship on the parties" (567 F.2d at 477-78) justified the denial of post-trial leave to assert these claims cast no cloud over the filing of a separate action. The court was enforcing the protection afforded to the existing parties there—the plaintiff employees—by the rules governing third-party practice. There was no hint that a separate suit directly against the unions would be objectionable.

I.

THE DECISION BELOW INSULATES UNIONS FROM LIABILITY FOR EQUAL PAY ACT VIOLATIONS AND MERITS REVIEW BY THIS COURT.

In an effort to hide the significance of the decision below, ALPA tries to suggest that it raises no threat to enforcement of the Equal Pay Act. Asserting that only the interests of "discriminatory employers" are at stake, ALPA insists that the case does not pose the question of union liability to employees. (Br. in Opp. 16). Without downgrading the independent significance of the rights of employers induced to agree to discriminatory wage scales, it is important to recognize that the decision below does directly threaten employees' rights under the Equal Pay Act.

While the court purported not to decide "definitely" whether an employee has the right to sue his or her union (Pet. App. 10d), the court expressly termed "remote" the possibility that it would acknowledge this right (*id.*). Moreover, the court bluntly stated that the "omission [of an express remedy against unions in the Equal Pay Act] insulates unions from suits by employees." (Pet. App. 9d). This unmistakable grant of immunity to discriminatory unions, allowing unions to escape any financial responsibility for the discrimination they cause, was the premise for the court's holding that

an employer has no right to contribution from a union.[1]

ALPA argues that allowing an employer to obtain contribution against a union would weaken enforcement of the Equal Pay Act against employers. (Br. in Opp. 14-15). But that argument proves too much, for it would justify barring even the EEOC (as successor to the Secretary of Labor) from joining unions in backpay actions brought on behalf of injured employees. ALPA's argument, like the decision below, is necessarily a challenge to the authority even of the EEOC to bring backpay suits against unions for Equal Pay Act violations. Previously, however, that authority was not in doubt. *See Hodgson v. Sagner, Inc.*, 462 F.2d 180 (4th Cir. 1972), *affirming* 326 F. Supp. 371 (D. Md. 1971). Of course, the decision below is even more hostile to backpay claims made directly by the injured employees.

Despite ALPA's wishful thinking on this issue, there

[1] In other areas of the law, other courts have used a different mode of analysis to decide whether, as a policy matter, contribution should be allowed even when the object of the contribution claim unquestionably would have had direct liability to the original plaintiff if sued by him. *Compare, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (recognizing contribution for antitrust liability), *with Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979) (denying contribution); *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. filed Oct. 30, 1979) (unpublished *per curiam*) (denying contribution), *petition for cert. filed sub nom. Westvaco Corp. v. Adams Extract Co.*, No. 79-972 (U.S. Dec. 21, 1979) (48 U.S.L.W. 3437).

ALPA only cites the cases denying contribution (Br. in Opp. 12, 20) without acknowledging this conflict.

is an explicit and admitted conflict among the Third, Fourth, Fifth, and District of Columbia Circuits about union liability for backpay under the Equal Pay Act. *See* cases discussed at Pet. 15-16. Since this case squarely poses this important issue, this is an excellent occasion to eliminate the confusion.

Citing this Court's recent decision in *International Brotherhood of Electrical Workers v. Foust*, No. 78-38 (U.S. May 29, 1979) (47 U.S.L.W. 4600), ALPA argues that this Court should deny review so as to protect "union treasuries." (Br. in Opp. 17). But as four members of this Court observed, concurring in the result in *Foust*, the proper concern is not with a union's "fiscal soundness" but only with not forcing it to "pay money for something that was not [its] fault." 47 U.S.L.W. at 4604 (Blackmun, J., joined by Burger, C. J., Rehnquist and Stevens, JJ.).

Indeed, the Court in *Foust* recognized the appropriateness of holding unions liable for compensatory damages; the Court declined only to find implicit authority for punitive damages. In this case, Northwest contends that the unions caused it to enter into contracts that were later determined in the *Laffey* litigation to violate the Equal Pay Act—a clear violation of the unions' statutory duty not to cause employers to commit violations of the Equal Pay Act. *See* 29 U.S.C. §206(d)(2). If ultimately found to have violated this prohibition in the Equal Pay Act and to be subject to a claim for contribution, the unions will pay only their fair share of Equal Pay Act damages caused by their

conduct. This result is fully consistent with *Foust.*[2]

Although the Equal Pay Act does not expressly create a private cause of action against a union that causes employers to violate the Equal Pay Act, thereby injuring both employers and employees, that silence alone is not dispositive. This Court has repeatedly reaffirmed its willingness to recognize implied remedies against unions that violate statutory duties under the federal labor laws. *E.g., Carbon Fuel Company v. United Mine Workers*, No. 78-1183 (U.S. December 10, 1979) (48 U.S.L.W. 4059, 4060 n.5); *International Brotherhood of Electrical Workers v. Foust, supra; Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944). No less than unions that breach the duty of fair representation or violate arbitration obligations, unions that cause employers to violate the Equal Pay Act do violence to important federal policies. The failure of Congress to provide an express remedy is attributable to understandable oversight, as explained in Northwest's petition (Pet. 9-11, 17-18), and not to conscious choice. *Compare Cannon v. University of Chicago*, No. 77-926 (U.S. May 14, 1979) (47 U.S.L.W. 4549).

While ALPA boldly insists that there is no legislative

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[2] Since ALPA has raised a vague specter of depletion of its treasury (Br. in Opp. 17), it is pertinent to observe that ALPA's resources are substantial. ALPA's Annual Report for 1978, filed with the Secretary of Labor pursuant to Section 201(b) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §431(b), shows that its assets on December 31, 1978, exceeded $24 million, and that it collected nearly $20 million in dues and nearly $22 million from the sale of investments. (Form LM-2, Statement A, item 31; Schedule 7, item 1).

history to support private suits under the Equal Pay Act against discriminating unions (Br. In Opp. 15 n*), that assertion cannot dispel the force of the unambiguous congressional statements quoted in the petition (at 17-18 nn.6 & 7). Those statements show that Congress understood that both employees and employers could bring private suits against unions and that unions would be "subject to *all the penalties and all the enforcement provisions* provided under the Fair Labor Standards Act." 109 Cong. Rec. 9209 (1963) (emphasis added).[3]

ALPA does not deny that the question of union liability for Equal Pay Act violations is one of great importance to employers, to employees and to unions. The issue merits this Court's attention. In view of the recent transfer of responsibility for public enforcement of the Equal Pay Act from the Secretary of Labor to the EEOC, this is an especially appropriate occasion for this Court to address it.[4]

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[3] ALPA observes irrelevantly that the Equal Pay Act as passed differed from the legislation originally proposed, but the colloquys quoted in the petition concern the language that was actually enacted into law.

[4] ALPA chooses to characterize for this Court the position of the Department of Labor on the contribution issue, relying on extracts from some lower court briefs (Br. in Opp. 11 n*).

If the Court wishes to be advised of the current authoritative position of the government, especially now that enforcement responsibility has been transferred to the EEOC, the proper course would be to invite the Solicitor General to file a brief expressing those views.

II.

THE TITLE VII ISSUES ARE RIPE FOR REVIEW BY THIS COURT.

ALPA argues that the Title VII issues are "premature" and "not ripe for review" because the court of appeals remanded the case to the district court. (Br. in Opp. 19-20). In making the prematurity argument, however, ALPA ignores the fact that it was the unions themselves that originally sought interlocutory review of the Title VII contribution question in the court of appeals, after the district judge had upheld this claim against them. At that time the unions recognized—as did the district court in granting a §1292(b) certification and as did the court of appeals in accepting the certificate—that it made no sense to try a complex employment discrimination case before a definitive determination whether the Title VII claim could be asserted at all. Although ALPA now finds it expedient to abandon the arguments that the unions made below, those arguments remain valid.

ALPA's suggestion that there is "no ruling for review" (Br. in Opp. 18) is absurd. That limited view of this Court's jurisdiction is unwarranted. While it is true that the court of appeals declined to decide the existence of a Title VII contribution claim, it is equally true that it had jurisdiction over this issue under §1292(b) and that this Court correspondingly has jurisdiction to decide it under 28 U.S.C. §1254(1). This Court may review any "cert worthy" issue in this case,

even though the court of appeals has sought to duck it.[5]

The exercise of this power is especially appropriate here. As Northwest noted in its petition (at 19), the Title VII issues merit review even apart from the Equal Pay Act issue because Title VII has a broader reach. But if this Court decides to hear the Equal Pay Act question, which is certainly ripe for review, it makes good sense to hear the analagous Title VII questions as well. In deciding the contribution question under the Equal Pay Act, this Court should consider the interplay between that Act and Title VII. The issue whether there can be contribution under either related Act should not be considered in a vacuum. Since the Equal Pay Act ruling is the subject of a Rule 54(b) final judgment, this may be the only opportunity the Court will have to consider the contribution issues under both that Act and Title VII.[6]

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[5] *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), where the Court granted certiorari in a "case not yet fully tried" and the issues that the court of appeals had remanded for trial were "fundamental to the further conduct of the case." *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154 (1964).

[6] ALPA asserts (Br. in Opp. 22) that this procedural posture is the "result of an unfortunate choice of litigation tactics" by Northwest, its request for entry of a Rule 54(b) judgment on the Equal Pay Act ruling. This amazing statement turns the facts on their head.

In fact, Northwest's request for Rule 54(b) certification came only after the unions sought permission for a §1292(b) interlocutory appeal on the Title VII claim. Both Northwest's request and the entry of a Rule 54(b) final judgment on the Equal Pay Act claim were contingent upon the acceptance of the Title VII appeal by the court of appeals. *See* Br. in Opp. App. 1b. Northwest, then as now, acted in the interest of judicial economy and in a desire to avoid fragmenting this litigation.

Moreover, the "laches" issue in this case is not, as ALPA contends, a "factual" question in need of evidentiary development by the district court before capturing this Court's attention. Rather, the issue that deserves to be addressed now is whether, as a matter of law, a Title VII contribution claim may be barred as untimely even though it is asserted before the judgment is paid (the time at which a contribution claim arises at common law).[7]

In sum, the questions concerning the availability of claims for contribution under Title VII are important. They are pure questions of law that are suitably presented by this record. For reasons of judicial economy and authoritative guidance, they should be decided by this Court now.

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[7]As a final strategy, ALPA attempts to attribute some significance to the fact that the court of appeals did not decide the "threshold question of whether the district court has jurisdiction to determine the union's Title VII liability." (Br. in Opp. 21). This "jurisdictional" observation is both misleading and irrelevant.

ALPA neglects to mention that the District of Columbia Circuit has repeatedly held that the EEOC charge-filing requirement on which ALPA relies is not a jurisdictional prerequisite to a Title VII claim. *E.g., Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 467-69 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Bethel v. Jefferson*, 589 F.2d 631, 641-42 (D.C. Cir. 1978). Moreover, ALPA's comment is merely another way of describing the issue that this Court is being asked to decide on the merits; the observation has no relevance to the question whether the Title VII contribution issue is ripe for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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